WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1665

IN THE MATTER OF:		Served March 29, 1977
Application of ANNETTE H. MILLING T/A MILLING TOURS for Certificate of Public Convenience and Necessity to Perform Special Operations	)))))	Application No. 933 Docket No. 322

By Application No. 933, filed April 7, 1976, as supplemented, Annette H. Milling trading as Milling Tours (Milling) seeks a certificate of public convenience and necessity, pursuant to Title II, Article XII, Section 4(b) of the Compact, to transport passengers, over irregular routes, in special sightseeing operations, (A) from motels and motor inns located on U. S. Highway 1 between the intersections of U. S. Highway 1 with Interstate Highway 95 at or near Woodbridge, Va., and Arlington, Va., to points in the District of Columbia and the City of Alexandria and Counties of Arlington and Fairfax, Va., and return; (B) from the Holiday Inn at Interstate Highway 95 and Glebe Road, Arlington, Va., to points in the District of Columbia and the City of Alexandria and Counties of Arlington and Fairfax, Va., and return; and (C) from the Virginia Motel on North Washington Street, Alexandria, Va., to points in the District of Columbia and the City of Alexandria and Counties of Arlington and Fairfax, Va., and return. 1/

Milling Tours has been operating since June 1, 1956, when applicant's husband began to provide a sightseeing service for patrons of the Brookside Hotel on U. S. Highway 1 in Fairfax County, Va. Apparently, in 1957 Mr. Milling became an agent for the Alexandria, Barcroft and Washington Transit Company (A,B & W) and leased equipment from that firm. After the creation of Washington Metropolitan Area Transit Authority (Metro), Milling obtained motor coaches from Metro as described in greater detail below. Mrs. Milling assumed that such operations were approved by the Interstate Commerce Commission (ICC) and was not aware that authority from this Commission was required until February, 1976. 2/ Subsequently, this application was filed.

1/ See Order Nos. 1537, 1554, 1562, 1570, and 1577, which are incorporated by reference herein. Descriptions of the three proposed tours and the proposed fares are contained in Order No. 1537. It is also noted that U. S. Highway 1 does not intersect Interstate Highway 95 at Arlington, Va., and that the correct junction is that of U. S. Highway 1 with Interstate Highway 495.

2/ Applicant's husband sought "Grandfather Authority" in Application No. 14. By Order No. 165, served June 26, 1962, it was found that Milling's operations at that time were those of a taxicab and did not require a certificate of public convenience and necessity. Accordingly, Application No. 14 was dismissed.

Milling now operates two air conditioned vehicles, an 11-passenger Chevrolet van and a nine-passenger Volkswagen van. Milling regularly employs one driver and hires a second driver on an as-needed basis. Sightseeing tickets are sold by various motels for a 30-percent commission, and the motel operators advise Milling each evening of the number of tickets sold for the next day. Whenever the number of reservations exceeds the capacity of Milling's vehicles, a motor coach and driver are leased from Metro. Metro's drivers are selected by Metro, generally from a list approved by Milling, and they are usually familiar with Milling's itinerary. Accordingly, no Milling employee normally participates as a guide or otherwise accompanies those tours run on Metro's equipment. 3/ Milling neither provides any special training for Metro drivers nor conducts any inspection of Metro vehicles used on Milling's tours.

Metro bills Milling on a monthly basis at the rate of $21.60 per hour per bus. 4/ In 1975, Milling leased 390 motor coaches from Metro at a total cost of $28,617. During the first six months of 1976, 63 buses were leased at a cost of $8,333. The above-quoted price includes drivers' salaries which are paid directly by Metro. Metro also bears all fuel, maintenance and insurance costs on these vehicles.

Financial data submitted by applicant includes a copy of Internal Revenue Service Schedule C (Profit or Loss from Sole Proprietorship), an income comparison of the first four months in calendar years 1975 and 1976, and a statement from Milling's bookkeeper indicating that both profits and gross income should increase in 1976 over 1975 because of increased tour prices, reduced commissions and an anticipated increase in tourism. For 1975, Milling's gross income was $97,304 and net profit amounted to $2,538. Principal expenses were commissions on ticket sales ($54,881), payments to Metro ($28,617), gas and oil ($2,116), and depreciation, taxes, insurance and printing. According to the Schedule C, Milling paid no salaries in 1975. 5/

At the time of the hearing, Milling was providing service to the following motels and trailer parks: Brookside, Harry Smith, Travelers, Statesman, Alexandria, Fairview, Value Inn, Virginia Lodge, Mount Vee, Keystone, Airport, Rainbow, Howard Johnson, Harmony Place Trailer Park and Nightingale Trailer Court, all on U. S. Highway 1, Holiday Inn on Glebe Road, Virginia Motel on North Washington Street and Pentagon Motel at 901 S. Clark Street, Alexandria, Va. 6/ Representatives of eight motels testified in support of the application.

3/ Occasionally, Metro provides a driver who is not a licensed guide, and at such times a Milling employee accompanies the tour as a lecturer.

4/ This represents a 10 percent reduction from Metro's regular rate because Mrs. Milling serves as a Metro "travel agent".

5/ Payments to non-Metro drivers are said to be commissions on ticket sales.

6/ Pentagon Motel is located just off U. S. Highway 1.

Mount Vee Motel has utilized Milling's service since 1968 and found it to be satisfactory. It has occasion to call Milling approximately 100 times a year and the average number of passengers per trip is approximately two. Patrons have consistently expressed their pleasure with Milling's tours.

Fairview Motel and Alexandria Motel are under common management and have an aggregate capacity of 35 units. Milling has been providing tour service there in excess of 13 years, and transports between 2 and 10 persons approximately 70 times a year. The motel management has not received any complaints from sightseers about Milling's service.

Travelers Motel has used Milling's service for approximately 20 years and has found it to be satisfactory at all times. The number of persons transported on any one tour varies from 1 to 20, and Milling is called for service ". . . a couple hundred times a year."

Airport Motel has been receiving satisfactory service from Milling since 1965, averaging approximately two persons each on 100 calls a year. Approximately the same number of service requests are generated at Pentagon Motel, which applicant has been serving since 1968. Holiday Inn and Howard Johnson's each use Milling approximately 300 times annually, with approximately 15 persons a day using the service from the former motel and 8 to 10 passengers a day originating at the latter facility. Again, Milling's service is said to be very satisfactory.

With respect to competing carriers, only Howard Johnson's has used any service other than Milling's in recent years. In 1975, The Gray Line, Inc., was utilized briefly, but that operation was discontinued because of service failures including missed pickups.

At the further hearing in this proceeding, 7/ counsel appeared on behalf of protestants The Gray Line, Inc., and White House Sightseeing Corporation. Neither protestant opposed the provision of service by applicant in van-type vehicles, but both expressed an interest in motor coach operations. Counsel for applicant indicated that Milling proposed " . . . to use the leased motor coaches only on those days when the number of reservations he has for sightseeing service exceeds the capacity of the vans which he operates." Counsel for protestants stated that he was not opposed to a continuation of Milling's past operations, but objected to any " . . . concerted effort to expand their operations. . . ." Counsel for the Commission's staff suggested that " . . . we allow the Commission to restrict the language within the intent of the application." Protestants' counsel cross-examined two witnesses for applicant, but declined, in light of the above described representations, to present any affirmative evidence.

7/ See Order No. 1570.

DISCUSSION AND CONCLUSIONS

The Compact, Title II, Article XII, Section 4(b) provides that a certificate of public convenience and necessity shall be issued by the Commission if it finds " . . . that the applicant is fit, willing and able to perform such transportation properly and to conform to the provisions of this Act and the rules, regulations, and requirements of the Commission thereunder, and that such transportation is or will be required by the public convenience and necessity; otherwise, such application shall be denied."

Turning first to the question of public convenience and necessity, the Commission finds that applicant has sustained its burden of proof on this issue. Evidence of past operations shows that Milling's service has been well received by the sightseeing public and public testimony further demonstrates that there will be a continuing demand for the proposed service.

With respect to applicant's "compliance" fitness, we note first that unauthorized operations have been conducted for a substantial period of time. Under the circumstances here present, however, the Commission nevertheless concludes that applicant will, in the future, conform its operations to pertinent regulatory requirements. There apparently existed a genuine belief that prior operations could be conducted without approval because of applicant's affiliation with other companies presumably holding operating rights from ICC (A,B & W) or otherwise not subject to the certification requirements of the Compact (Metro). Moreover, Milling had previously sought sightseeing authority and been told that a certificate of public convenience and necessity was not required. Accordingly, the past unlawful operations conducted by applicant do not appear to warrant a finding of unfitness. The Commission also finds that applicant has demonstrated its financial fitness properly to conduct the operations authorized hereinbelow.

Having discussed the issues of compliance and financial fitness, there remains for consideration the question of operational fitness. To the extent that the proposed service would involve transportation in van-type vehicles, applicant has shown that it has available suitable equipment, appropriately experienced drivers, and that it is generally capable of rendering a continuous and adequate service to the public. 8/ To the extent that service is to be provided in motor coaches, however, the Commission finds that applicant has failed to establish its capability to provide such service for the reasons set forth below.

Initially, it should be repeated that applicant owns no motor coaches, nor has it established on the record that its employees are qualified or licensed to operate motor coaches. Moreover, the financial data submitted by applicant does not affirmatively show that applicant could acquire motor coaches of its own by any method other than so-called "equipment leases".

8/ Applicant has not, however, documented that it maintains security for the protection of the public as prescribed in Regulation 62-03 (a) of the Commission's Regulations, as amended. Proof of compliance with this regulation will be required.

In the past applicant has "leased" buses and drivers from either A, B & W or Metro. Applicant never inspected the vehicles, had no absolute control over the choice of driver, could not subject the driver to its control, and did not maintain insurance on this non-proprietary equipment. Moreover, there is no claim that the relationship between Milling and Metro (or its driver) is that of master - servant or principal - agent, respectively. To the contrary, Milling claims to be a "travel agent" for Metro.

The Compact, Title II, Article XII, Section 2(a) defines a "carrier" as " . . . any person who engages in the transportation of passengers for hire by motor vehicle . . ." (Emphasis added.) Additionally, Section 3 of the same Article imposes on all carriers the duties, inter alia, ". . . to furnish transportation subject to this Act as authorized by its certificate and *** to provide safe and adequate service, equipment and facilities in connection with such transportation . . ." Nothing in the Compact indicates that anyone other than the carrier can engage in the transportation of passengers for hire or assume the obligations attendant thereto.

It is a well-established principle in motor carrier law that a carrier must control the instrumentalities of transportation and be responsible both to the appropriate regulatory agency and the general public for its transportation service, and, as can readily be seen from the above-cited provisions, the Compact preserves and codifies this principle. 9/

9/ In addition, the Compact, Title II, Article XII, Section 21 provides that:

> All rules, regulations, orders, decisions, or other action prescribed, issued, made, or taken by the Interstate Commerce Commission, the Public Utilities Commission of the District of Columbia, the Public Service Commission of Maryland, or the State Corporation Commission of Virginia, and which are in force at the time this section takes effect, with respect to transportation or persons subject to this Act, shall remain in effect, and be enforceable under this Act and in the manner specified by this Act, according to their terms, as though they had been prescribed, issued, made, or taken by the Commission pursuant to this Act, unless and until otherwise provided by such Commission in the exercise of its powers under this Act.

Accordingly, while this Commission is free to depart from prescriptions of the other above-named Commissions, those mandates in force at the time the Compact was adopted continue in effect and are binding on persons subject to the Compact and this Commission's jurisdiction thereunder.

The question of whether a person is a carrier (as opposed to a broker, forwarder, agent, employee or some other status) is often difficult to determine and usually requires a careful analysis of the factual circumstances involved. The problem first was confronted by ICC in 1935 in connection with so-called "grandfather" applications filed under section 206 of the Interstate Commerce Act (49 U.S.C. 306). 10/ For example, in Gerard Motor Exp., Inc., Common Carrier Application, 2 M.C.C. 271 (1937), in considering an alleged employment and equipment contract entered into by Gerard and connecting carriers, Division 5 of the ICC stated at page 276:

> Certain it is that applicant has no authority under the act to operate as a motor carrier in interstate or foreign commerce . . . and cannot be given such authority by contract with connecting carriers. The contract purports merely to make it the agent of the connecting carriers in the performance of their own transportation under operating rights which they claim to hold. It appears, however, that, notwithstanding the form of the contract, its real substance and effect may be to give applicant permission to conduct operations in its own behalf over the routes of other carriers, a permission which cannot lawfully be granted. *** The carrier under whose rights the interchanged equipment is operated must assume full responsibility for the direction, conduct, condition and operation of such equipment while it is in its possession.

Similarly, in Acme Fast Freight, Inc., Common Carrier Application, 8 M.C.C. 211 (1938), the entire Commission considered, inter alia, whether certain "indirect" operations 11/ constituted service by a common carrier 12/ and again emphasized the criteria of control and responsibility.

10/ It should be noted that although the burden of proof in "grandfather" applications differs from the standard of "public convenience and necessity" applicable to this application, applicant's reliance herein on evidence of past operations approximates the type of evidence required in "grandfather" proceedings.

11/ Involved were operations of " . . . nearly 2,100 other motor carriers whose service applicant utilizes . . ."

12/ It should be noted that the definition of a common carrier in Section 203 (a)(14) of the Interstate Commerce Act / 49 U.S.C. 303 (a)(14) / is somewhat broader than the definition of a carrier set forth in the Compact.

In the oft-cited report in Dixie Ohio Exp. Co. Common Carrier Application, 17 M.C.C. 735, Division 5 dealt at great length with the use of vehicles owned by others (owner-operators) by an applicant for motor common carrier authority under the grandfather clause. Herein, the Commission stated at page 740 that "If the vehicles of the owner-operators, while being used by applicant, were operated under its direction and control, and under its responsibility to the general public as well as to the shipper, then its operations, in which such vehicles were employed (are those of) a common carrier by motor vehicle." The concurring opinion of Commissioner Eastman further amplifies this position as can be seen by the following excerpts.

> The essential question, briefly stated, is whether applicant has utilized the equipment and services of the owner-operators as a patron, i.e., as a shipper utilizes the services of a carrier, or under an arrangement which brings the operations of the owner-operators under its domination and control so that they become, in effect, part and parcel of its own operations. ***
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> The lease or other arrangement under which the carrier utilizes in its operations a vehicle which it does not own, whether or not including the services of an owner-driver or his representative, must be of such a character that the carrier will have the right to direct and control the operation of the vehicle at all times and be fully responsible therefor in all respects under all applicable provisions of law governing the duties and obligations of the carrier to the shipper and to the public generally. 13/
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> The right to direct and control the operations of the vehicle must, as the wording of this rephrased ruling is designed to indicate, be a continuing right capable of being exercised at all times, whether or not it is in fact so exercised. In this it is distinguished from the instructions which a shipper may give to a carrier with respect to the movement of goods prior to such movement, or any prior agreement they may have with respect thereto. The ruling is also so phrased as to be applicable to all motor carriers, both common and contract, and to past as well as future operations.
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> To illustrate the latter point, attention is called to the words, "fully responsible therefor under all applicable provisions of law governing the duties and obligations of the carrier to the shipper and to the public generally". It is clear that a motor

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13/ This sentence was proposed by Commissioner Eastman as a replacement for Administrative Ruling No. 4.

> carrier cannot, by utilizing in its operations a vehicle which it does not own and the services of the owner, divest itself of any of its duties under the Motor Carrier Act or in any way defeat our powers of regulation thereunder. For the future, so far as the rates charged and the service furnished are concerned, and also security for the protection of the public and such matters as our regulations governing safety of operation and hours of service of employees, or any other duty imposed by or under the act, the carrier must be fully responsible for the operation of the vehicle. (Emphasis in original.)

Subsequently, in Ex Parte No. MC-43, Lease and Interchange of Vehicles by Motor Carriers, ICC found it necessary to prescribe formal leasing regulations. 14/ While the provisions of 49 CFR 1057 apply only to carriers of property, the concepts of control and responsibility clearly apply also to carriers of passengers, and ICC has always presumed that when, as here, a second party provides both vehicle and driver for performance of a transportation service, then the operation is, in fact, that of the second party. See E. D. Pearce Bus Corp. Contract Carrier Application, 84 M.C.C. 743, 746 (1961), citing with approval Pacific Diesel Rental Co. - Investigation of Operations, 78 M.C.C. 161 (1958). 15/

We find the necessary elements of responsibility and control lacking in the service said to be provided by Milling, but actually being operated in a Metro vehicle, by a Metro driver, under Metro's control. 16/ Operations conducted in this manner, accordingly, are unlawful under the Compact and cannot be sanctioned or permitted to continue by this Commission. Accordingly, applicant will be ordered to cease and desist from such operations.

In light of the above discussion, and in the absence of any probative evidence that applicant is capable of lawfully providing safe and adequate service in motor coaches, the Commission finds that the evidence warrants a grant of authority to provide service only in van-type vehicles. This finding, of course, obviates the need for any such operational restriction as suggested by applicant's and protestant's counsel.

14/ 49 CFR 1057. See also 51 M.C.C. 461, 52 M.C.C. 675, 64 M.C.C. 361, 68 M.C.C. 553, 79 M.C.C. 65, 79 M.C.C. 251, 89 M.C.C. 683, and 123 M.C.C. 574.

15/ See particularly 78 M.C.C. 174-176. Compare also United States v Drum, 368 U.S. 370, 82 S.Ct. 408 (1962), affirming the report of ICC, Division 1, in Oklahoma Furniture Mfg. Co. - Investigation, Operations, 79 M.C.C. 403 (1959).

16/ The Compact, Title III, (Transit Authority Compact), Article 1(g), however, defines "transit services" as not including taxicab service or individual-ticket-sales sightseeing operations.

One further matter requires discussion. As stated above, Pentagon Motel is located on South Clark Street rather than U. S. Highway 1, and is technically beyond the territorial scope of this application. Also, Harmony Place Trailer Park and Nightingale Trailer Court, not being "motels or motor inns" are not embraced by the application. No amendments to the application to include these points have yet been offered. Where no application exists, none can be granted.

The Commission has considered all other matters presented by the record, but finds that they neither require discussion herein nor warrant action contrary to that which is now directed.

THEREFORE, IT IS ORDERED:

1. That Application No. 933 of Annette H. Milling trading as Milling Tours, be, and it is hereby, granted as set forth below.

IRREGULAR ROUTES

SPECIAL OPERATIONS, transporting passengers in sightseeing tours:

(1) From motels and motor inns located at points on that part of U. S. Highway 1 south of junction U. S. Highway 1 and Interstate Highway 495 at or near Alexandria, Va., and north of junction U. S. Highway 1 and Interstate Highway 95 at or near Woodbridge, Va., to points in the District of Columbia, and the City of Alexandria and Counties of Arlington and Fairfax, Va., and return.

(2) From Holiday Inn, junction Interstate Highway 95 and Glebe Road, Arlington County, Va.; and Virginia Motel, 700 N. Washington Street, Alexandria, Va.; to points in the District of Columbia and the City of Alexandria and Counties of Arlington and Fairfax, Va.; and return.

RESTRICTION: Restricted in (1) and (2) above to transportation performed in van-type vehicles and further restricted against transportation solely within the Commonwealth of Virginia. 17/

17/ See Compact, Title II, Article XII, Section 1(b).

2. That Application No. 933 of Annette H. Milling, trading as Milling Tours, except to the extent granted above, be, and it is hereby, denied.

3. That Annette H. Milling, trading as Milling Tours be, and is hereby, directed to file two copies of WMATC Tariff No. 1 in accordance with the authority granted hereinbefore, such tariff to be effective upon acceptance by the Executive Director.

4. That Annette H. Milling, trading as Milling Tours be, and is hereby, directed to file (i) evidence of suitable security for the protection of the public as required by Commission Regulation 62-03(a), and (ii) an itinerary for provision of the service authorized herein and a list of stops to be served thereunder, said information to be effective upon the issuance of a certificate of public convenience and necessity.

5. That upon compliance by applicant with the directives set forth in 3 and 4 above, an appropriate certificate of public convenience and necessity be issued.

6. That unless applicant complies with the directives set forth above within 30 days after the date of service hereof, or within such additional time as may be authorized by the Executive Director, the grant of authority made herein shall be considered as null and void and the application shall stand denied in its entirety effective upon expiration of the said compliance time.

7. That Annette H. Milling trading as Milling Tours be, and is hereby, directed, within 30 days after the date of service hereof, (i) to show cause, if any there be, why an order should not be entered directing applicant to cease and desist from future participation, directly or indirectly, in the provision of service by persons other than carriers holding appropriate authority, and (ii) to inform the Commission of applicant's ability, if any there be, to conduct its own operations in vehicles other than van-type vehicles.

BY DIRECTION OF THE COMMISSION:

WILLIAM H. McGILVERY
Executive Director

STRATTON, Chairman, concurs:

While I agree with the disposition reached in this matter, it appears appropriate to append a vernacular explanation of what the applicant may and may not do under this decision.

First, Milling may offer individually-ticketed sightseeing tours in van-type vehicles, from and to the points authorized. Second, because no capacity to do so has been shown, no operations in buses may be conducted by Milling as a carrier. If the applicant, on reconsideration, can establish its own capability to provide tours in buses, reexamination of this issue may be warranted.

Third, the Commission has instructed Milling to show cause why it should not be ordered to cease and desist from certain activities. The immediate question, of course, is from precisely what activities Milling may be required to cease and desist. As noted, applicant may not provide service in buses without appropriate authority. Also, it is contemplated that Milling not assist any other carrier, by sale of tickets or otherwise, in conducting unauthorized operations. Implicit is the Commission's view that individually-ticketed sightseeing operations, as proposed by Milling in conjunction with Metro, are beyond the purview of Metro's statutory authority.

This does not mean that applicant, should it choose to do so, may not enter into a lawful agency agreement with a carrier holding appropriate authority. Conceivably, an arrangement could be concluded with an authorized carrier, whereby Milling would transport less-than-busload passengers in vans as a carrier, but would offer busload tours as agent in the name of a certificated carrier. Any such arrangement should be explained to the consuming public, possibly by printing an appropriate notice on the sightseeing tickets, and conducted under the authority and at the rates approved for the carrier providing the service.

The above comments, naturally, are without prejudice to applicant's right, on reconsideration or otherwise, to argue the validity of its proposed operations.